

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

UNITED STATES OF AMERICA)
)
)
v.) Case No. 3:07CR00001
)
)
KEVIN ALFRED STROM)

MOTION FOR DAUBERT HEARING ON ADMISSIBILITY OF GOVERNMENT'S
EXPECTED EXPERT TESTIMONY

The defendant, Kevin Strom, through counsel and pursuant to Federal Rules of Evidence 403 and 702, respectfully moves this Honorable Court to exclude all expert witness testimony purporting to determine the age of the persons portrayed in the evidence upon the basis of the application of the "Tanner Scale" to review of a visual depiction. Counsel requests a hearing on this motion pursuant to Federal Rules of Evidence 104(a) and 702.

In support of this motion, counsel states:

Federal Rule of Evidence 702 provides that scientific and technical evidence is admissible only if: (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case.

Upon information and belief, the government intends to rely on expert testimony from Dr. Mary Anne Mayo. Dr. Mayo is a pediatrician who is expected to testify as to her opinion as to the ages of individuals depicted in computer images. This expected testimony goes to the receipt of child pornography charges in Counts Two-Five and the possession of child pornography

charge in Count Six. The government has provided counsel with a report from Dr. Mayo in which Dr. Mayo states that she bases her observations as to the chronological age of the individuals depicted in the images based on the uniformly accepted Tanner stages of breast and pubic hair development for females.

The “Tanner Scale of Human Development” provides a “basis for estimating a person’s stage of physiological development.” *U.S. v. Hilton*, 386 F.3d 13, 15(1st Cir. 2004). The application of the “Tanner Scale” to a visual depiction for the purpose of determining the age of the person depicted is not valid and reliable scientific methodology and does not comport with the requirements of evidentiary reliability articulated by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Daubert* set forth a number of factors that the courts can use to determine the reliability of expert testimony, including (1) whether the expert’s technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. *Id.* at 593-594.

A hearing to determine the reliability of the use of the Tanner Scale is particularly appropriate in light of Dr. Tanner’s repudiation of the use of the Tanner scale to estimate probable chronological age rather than sexual maturation stage. Arlan L. Rosenbloom & James

M. Tanner, Letter to the Editor, *Misuse of Tanner Puberty Staging to Estimate Chronological Age*, 102 Pediatrics 1494 (1998).

WHEREFORE, the defendant respectfully requests that the Court hold a hearing pursuant to Federal Rules of Evidence 104(a) and 702 to assess the reliability of the government's scientific testimony.

Respectfully Submitted,

KEVIN ALFRED STROM
By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was electronically filed and will be forwarded via the Court's electronic filing system to William F. Gould, of the Office of the United States Attorney, this 10th day of September, 2007.

s/Andrea L. Harris